

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEVADA

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4 PN II, INC. dba PULTE HOMES OF  
5 NEVADA, and PULTE HOME CORP.,

6 Plaintiffs,

7 v.

8 ASPEN MANUFACTURING, LTD., and  
9 DOES 1-100,

10 Defendants.

Case No. 2:14-cv-01382-APG-VCF

**ORDER GRANTING DEFENDANTS'  
MOTION FOR SUMMARY  
JUDGMENT**

(ECF No. 44)

11 Plaintiffs PN II, Inc. and Pulte Home Corporation ("Pulte") were the developer and  
12 general contractor for residential housing communities in Nevada and California. Construction  
13 included installation of heating, ventilation, and air conditioning (HVAC) systems allegedly  
14 manufactured in part by defendant Aspen Manufacturing, Ltd. (Aspen). Homeowners made  
15 warranty claims to Pulte concerning the HVAC systems, including complaints that the systems  
16 were not properly cooling their homes or were leaking and causing damage.

17 Pulte investigated the complaints, and made and paid for repairs and associated damage.  
18 Pulte sued Aspen to recover its expenses. Pulte alleges claims based on equitable indemnity,  
19 contribution, breach of the implied warranties of merchantability and fitness for a particular  
20 purpose, negligence, and strict products liability.

21 Aspen moves for summary judgment on all of Pulte's claims. Aspen contends the  
22 negligence and strict products liability claims are barred by the economic loss doctrine. With  
23 respect to the equitable indemnity claim, Aspen argues that Nevada law requires a special  
24 relationship between the parties and blamelessness on the part of the party seeking indemnity,  
25 neither of which is present here. With respect to the implied warranty claims, Aspen argues that  
26 it validly disclaimed both implied warranties. Aspen argues that the contribution claim is barred

1 because Pulte has not met the statutory requirement of extinguishing its liability to the  
2 homeowners.

3 Pulte responds the economic loss doctrine does not apply, or in the alternative that there is  
4 a genuine dispute about whether it applies. With respect to the equitable indemnity claim, Pulte  
5 contends that a special relationship is unnecessary because Aspen has a duty to protect Pulte  
6 pursuant to the implied warranty of merchantability. As to the implied warranty claims, Pulte  
7 argues that Aspen's disclaimer of the implied warranty of merchantability did not meet the  
8 statutory requirements, and that there is a genuine issue of material fact as to whether the products  
9 at issue were covered by the disclaimer. Finally, with respect to the contribution claim, Pulte  
10 argues that there is a genuine dispute as to whether Pulte extinguished Aspen's liability to the  
11 homeowners in its settlement agreements with the homeowners in California.

12 The parties are familiar with the facts in this case. I will not repeat them here except  
13 where necessary. I grant Aspen's motion for summary judgment on all of Pulte's claims.

#### 14 I. ANALYSIS

15 Summary judgment is appropriate if the pleadings, discovery responses, and affidavits  
16 demonstrate "there is no genuine dispute as to any material fact and the movant is entitled to  
17 judgment as a matter of law." Fed. R. Civ. P. 56(a), (c). A fact is material if it "might affect the  
18 outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248  
19 (1986). An issue is genuine if "the evidence is such that a reasonable jury could return a verdict  
20 for the nonmoving party." *Id.*

21 The party seeking summary judgment bears the initial burden of informing the court of the  
22 basis for its motion and identifying those portions of the record that demonstrate the absence of a  
23 genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden  
24 then shifts to the non-moving party to set forth specific facts demonstrating there is a genuine  
25 issue of material fact for trial. *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 531 (9th Cir.  
26 2000). I view the evidence and draw reasonable inferences in the light most favorable to the non-  
27 moving party. *James River Ins. Co. v. Hebert Schenck, P.C.*, 523 F.3d 915, 920 (9th Cir. 2008).

1                   **a. Breach of implied warranties**

2                   Under Nevada law, “[u]nless excluded or modified . . . a warranty that the goods shall be  
3 merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods  
4 of that kind.” Nev. Rev. Stat. § 104.2314. In addition, “[w]here the seller at the time of  
5 contracting has reason to know any particular purpose for which the goods are required and that  
6 the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods, there is  
7 unless excluded or modified . . . an implied warranty that the goods shall be fit for such purpose.”  
8 *Id.* § 104.2315. These implied warranties of merchantability and fitness for a particular purpose  
9 can be excluded or modified under Nevada Revised Statute § 104.2316:

10                                 2. Subject to subsection 3, to exclude or modify the implied  
11                                 warranty of merchantability or any part of it the language must  
12                                 mention merchantability and in case of a writing must be  
13                                 conspicuous, and to exclude or modify any implied warranty of  
14                                 fitness the exclusion must be by a writing and conspicuous.  
15                                 Language to exclude all implied warranties of fitness is sufficient  
16                                 if it states, for example, that “There are no warranties which extend  
17                                 beyond the description on the face hereof.”

18                                 3. Notwithstanding subsection 2:

19   (a) Unless the circumstances indicate otherwise, all implied  
20   warranties are excluded by expressions like “as is,” “with all  
21   faults” or other language which in common understanding calls the  
22   buyer’s attention to the exclusion of warranties and makes plain  
23   that there is no implied warranty . . . .”

24                   Aspen argues that Pulte’s claims for breach of the implied warranties of merchantability  
25                   and fitness for a particular purpose fail because Aspen validly disclaimed these warranties under  
26                   this statute. The warranty on the coils included a disclaimer that stated: “ASPEN MAKES NO  
27                   WARRANTY, EXPRESS OR IMPLIED, OF FITNESS FOR ANY PARTICULAR  
28                   PURPOSE . . . .” ECF No. 44, Ex. 1 (capitals in original). Pulte admits that it “considers the  
language of the warranty to likely have been sufficient to disclaim the implied warranty of fitness  
for a particular purpose.” ECF No. 49 at 30 n.12. Thus there is no dispute that Aspen validly  
disclaimed the implied warranty of fitness.

1           The warranty also states that Aspen “warrants to its direct purchasers that Coils sold to  
2           them shall be of a merchandisable quality, free of defects in material or workmanship, under  
3           normal use and service for a period of five (5) years.” ECF No. 44, Ex. 1. Further, it states that  
4           “THE FOREGOING IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR  
5           IMPLIED . . . .” *Id.* Aspen argues that under Nevada Revised Statute § 104.2316(3), this  
6           disclaimer is sufficient to exclude the implied warranty of merchantability as it “qualifies as  
7           language which in common understanding calls the buyer’s attention to the exclusion of  
8           warranties and makes plain that there is no implied warranty.” ECF No. 44 at 15–16 (internal  
9           quotation omitted).

10           Pulte argues that there is no reference to the implied warranty of merchantability as  
11           required in Nevada Revised Statute § 104.2316(2). Alternatively, Pulte argues that under section  
12           3 of the provision, circumstances here “indicate otherwise” because Aspen “explicitly recognizes  
13           a warranty of merchantability.” ECF No. 49 at 29. Aspen responds that its express warranty  
14           regarding merchantability does not affect its disclaimer of implied warranties.

15           Official Comment 6 to this statute notes that the section 3 “exceptions to the general rule  
16           [of section 2] are common factual situations in which the circumstances surrounding the  
17           transaction are in themselves sufficient to call the buyer’s attention to the fact that no implied  
18           warranties are made or that a certain implied warranty is being excluded.” In *Scaffidi v. United*  
19           *Nissan*, the district court held that a window placard on a car stating that it was sold “AS IS – NO  
20           WARRANTY” effectively disclaimed the implied warranty of merchantability. 425 F. Supp. 2d  
21           1172, 1186 (D. Nev. 2005). The court held that the term “as is” sufficiently called the buyer’s  
22           attention to the exclusion of implied warranties, even though no mention was explicitly made of  
23           the implied warranty of merchantability. *Id.* In this case, Aspen’s disclaimer was even clearer as  
24           to the exclusion of implied warranties, although it too did not explicitly mention the implied  
25           warranty of merchantability. Aspen’s express warranty of merchantability does not negate its  
26           disclaimer of all implied warranties. Therefore, Aspen also validly disclaimed the implied  
27           warranty of merchantability.  
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1 Pulte also argues that there is a genuine dispute over whether these disclaimers apply to  
2 the component parts at issue. Aspen admits that it changed the disclaimer for later products.  
3 However, Aspen submitted a declaration by its Vice President of Operations stating that the  
4 warranty and disclaimer (ECF No. 44, Ex. 1) were “applicable to the coils and drains at issue in  
5 this case,” were “in effect from October 1, 1993 through April 2007,” and “accompanied all  
6 product that left Aspen’s manufacturing facility during that time period.” ECF No. 44, Ex. 7.  
7 Aspen also produced a spreadsheet created by one of Pulte’s experts listing the close of escrow  
8 dates of the damaged homes. *Id.*, Ex. 3. Pulte responds by pointing to three homes that sold  
9 within a few months after the disclaimer was ostensibly changed.

10 Pulte has not produced any evidence to counter Aspen’s declaration that all of the  
11 products at issue were subject to the original disclaimer. Pulte’s evidence merely shows that three  
12 houses were sold a few months after the disclaimer changed; but that does not show that the  
13 HVAC system components in those houses were installed under a different disclaimer. Pulte has  
14 produced no evidence that is “significantly probative” as to call into question Aspen’s declaration  
15 that the disclaimer applies to the products at issue in the case. *See Anderson*, 477 U.S. at 249–50.  
16 Pulte has therefore not met its burden to establish a genuine issue of material fact. I grant the  
17 defendant’s motion for summary judgment as to the claims for breach of the implied warranties.

#### 18 **b. Contribution**

19 The right to contribution in Nevada is a statutory right. *See Nev. Rev. Stat. § 17.225.*  
20 Under that statute, “the remedy of contribution allows one tortfeasor to extinguish joint liabilities  
21 through payment to the injured party, and then seek partial reimbursement from a joint tortfeasor  
22 for sums paid in excess of the settling or discharging tortfeasor’s equitable share of the common  
23 liability.” *The Doctor’s Co. v. Vincent*, 98 P.3d 681, 686 (Nev. 2004). “A tortfeasor who enters  
24 into a settlement with a claimant is not entitled to recover contribution from another tortfeasor  
25 whose liability for the injury . . . is not extinguished by the settlement . . .” Nev. Rev. Stat.  
26 § 17.225(3). A tortfeasor seeking contribution following a settlement “must explicitly extinguish  
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1 the liability of the joint tortfeasor from whom contribution is sought as part of the settlement.”

2 *The Doctor’s Co.*, 98 P.2d at 690.

3 Aspen argues that Pulte’s repair of the homes can be considered a pre-judgment settlement  
4 and that Pulte “has not produced any releases” that “explicitly extinguished the homeowners’  
5 rights against Aspen.” ECF No. 44 at 12. In response, Pulte argues that there is a genuine issue of  
6 material fact as to whether the settlement releases between it and the homeowners in the  
7 California residences extinguished Aspen’s liability. Those release agreements provide that the  
8 homeowner “assigns to Pulte all claims and rights . . . against the manufacturers, suppliers and  
9 installers of the original HVAC condensate coil and drain pan and all of its component parts.”  
10 ECF No. 49, Ex. 2.

11 The assignment of claims from the homeowners to Pulte did not extinguish Aspen’s  
12 potential liability. Instead, it simply shifted who would be able to sue Aspen. Therefore, Pulte is  
13 not entitled to recover contribution from Aspen, as Aspen’s liability was not explicitly  
14 extinguished by the settlement between Pulte and the homeowners. I therefore grant Aspen’s  
15 motion for summary judgment on the contribution claim.

16 **c. Negligence and strict products liability**

17 Aspen argues that Pulte’s negligence and strict liability claims are barred by the economic  
18 loss doctrine. The economic loss doctrine is “a judicially created rule” that “bars unintentional  
19 tort actions when the plaintiff seeks to recover ‘purely economic losses.’” *Terracon Consultants*  
20 *Western, Inc. v. Mandalay Resort Grp.*, 206 P.3d 81, 85–86 (Nev. 2009). “[P]urely economic  
21 losses are not recoverable in tort absent personal injury or property damage.” *Id.* at 87. Aspen  
22 argues Pulte is seeking to recover the cost of repairing houses so its only damage is economic.  
23 Aspen argues that Pulte “incurred expense in making repairs to the homeowners’ property, [but] it  
24 did not suffer any damage to its own property,” nor did it suffer personal injury. ECF No. 44 at 6.  
25 Pulte argues that it has suffered property damage, or at least there is a genuine issue of material  
26 fact about whether it did.

1 I grant Aspen's motion because Pulte did not own any of the houses in question at the time  
2 of the damage.<sup>1</sup> In *Terracon*, the Supreme Court of Nevada noted that the lack of "possessory or  
3 proprietary interest" in the property damaged and lack of "accompanying personal injuries"  
4 prevented the plaintiffs from recovering in tort. 206 P.3d at 87 (citing *Local Joint Exec. Bd. of Las*  
5 *Vegas, Culinary Workers Union, Local No. 226 v. Stern*, 651 P.2d 637, 638 (Nev. 1982) (per  
6 curiam)); see also *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 309 (stating the general  
7 rule that a party cannot recover purely economic losses in tort without suffering personal injury or  
8 damage to its property). Pulte did not own the houses that were damaged and therefore did not  
9 suffer harm to its property.

10 Even though Pulte claims in its complaint that it is suing Aspen in tort standing in the  
11 shoes of the homeowners, the tort claims still fail as a matter of law. "Purely economic loss is  
12 generally defined as the loss of the benefit of the user's bargain . . . ." *Calloway v. City of Reno*,  
13 993 P.2d 1259, 1263 (Nev. 2000) (internal quotations omitted), *overruled on other grounds by*  
14 *Olson v. Richard*, 89 P.3d 31 (Nev. 2004). The homeowners purchased a home with an HVAC  
15 unit, not the HVAC unit itself. In *Calloway*, the Supreme Court of Nevada held that "when a  
16 heating and plumbing system damages the building as a whole, the building has injured itself and  
17 only economic losses have occurred." *Id.* at 1268. Similarly, when an installed HVAC unit  
18 causes damage to the home, this is considered purely economic loss. See *Tharaldson Fin. Grp.,*  
19 *Inc. v. AAF McQuay, Inc.*, 2014 WL 4829649, at \*3 (D. Nev. Sept. 30, 2014) ("[W]hile it may be  
20 a question of fact whether some products installed in buildings retain their separate identity as  
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23 <sup>1</sup> Pulte argues that Aspen has not met its burden because it raised the economic loss doctrine as an  
24 affirmative defense but "presented no evidence in support." ECF No. 49 at 6. However, Aspen's  
25 motion relied on the allegations in Pulte's complaint. The allegation that Pulte was not the  
26 homeowner is a judicial admission that binds Pulte. *Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d  
27 224, 226 (9th Cir. 1988); see ECF No. 1 at 2, 3 ("Homeowners in the Communities complained to  
28 Plaintiffs that water was leaking . . . causing damage to their home . . ."). Pulte produces no  
evidence that it owned the homes in question. In fact, Pulte specifically argues that it is bringing  
the claims as the "**general contractor/builder** of the damaged residences – not the owner of the  
residences." ECF No. 29 at 12 (emphasis in original); see also ECF No. 44, Ex. 3 (listing the  
homes and homeowners, none of whom is identified as Pulte).



1 products, in Nevada, an installed HVAC unit is an integrated and integral part of the building, and  
2 damage to the [p]roperty caused by the HVAC is purely economic loss.”).

3 Thus, Pulte has failed to show that it has suffered personal injury or property damage. It  
4 incurred only the costs to repair the homeowners’ homes, a purely economic loss for which it  
5 cannot recover in tort. I therefore grant the defendant’s motion for summary judgment on Pulte’s  
6 negligence and strict products liability claims.

7 **d. Equitable indemnity**

8 Equitable indemnity “allows a defendant to seek recovery from other potential tortfeasors”  
9 only when a defendant “who has committed no independent wrong, is held liable for a plaintiff’s  
10 loss caused primarily by another party.” *Pack v. LaTourette*, 277 P.3d 1246, 1248–49 (Nev. 2012)  
11 (quotation omitted). Equitable indemnity “is not usually available between joint tortfeasors.”  
12 *Black & Decker (U.S.), Inc. v. Essex Grp., Inc.*, 775 P.2d 698, 699 (Nev. 1989). An exception to  
13 this rule exists if there is “a preexisting relationship between” the joint tortfeasors “or some duty  
14 on the part of the primary tortfeasor to protect the secondary tortfeasor.” *Pack*, 277 P.3d at 1249  
15 (quotation omitted); *Black & Decker*, 775 P.2d at 700 (holding an implied warranty of  
16 merchantability created a duty supporting an equitable indemnity claim). Even under this  
17 exception, if a party is “actively negligent,” it “has no right to indemnity from other tortfeasors.”  
18 *Pack*, 277 P.3d at 1249.

19 Aspen argues that it had no preexisting relationship with Pulte because it had no contract  
20 with Pulte and “no detailed knowledge of what happens after it sells its products to a  
21 supplier/distributor.” ECF No. 44 at 8. Aspen also argues that Pulte’s own expert establishes that  
22 Pulte was at least partially at fault, and so it cannot recover.

23 Pulte argues that a relationship is not necessary, as Aspen owes it a duty based on the  
24 implied warranty of merchantability under *Black & Decker*. Pulte also disputes Aspen’s  
25 characterization of the expert testimony and whether Pulte was actively negligent such that it  
26 could not recover.



1 Pulte does not contend that it has a preexisting relationship with Aspen. Instead, Pulte  
2 argues that it has a right to indemnity because Aspen owes Pulte a legal duty pursuant to an  
3 implied warranty of merchantability. But Aspen validly disclaimed the implied warranty of  
4 merchantability regarding the products at issue. Thus, Aspen does not owe Pulte a duty based on  
5 that implied warranty and Pulte has offered no other evidence of a duty or relationship that would  
6 support its claim to equitable indemnity. Pulte has not established a genuine issue of material fact  
7 regarding its right to indemnification from Aspen. Therefore, I grant Aspen's motion for  
8 summary judgment on this claim.

9 **II. CONCLUSION**

10 IT IS THEREFORE ORDERED that the defendant Aspen Manufacturing Ltd.'s motion  
11 for summary judgment (**ECF No. 44**) is **GRANTED**. The clerk of court is directed to enter  
12 judgment accordingly.

13 DATED this 28th day of September, 2017.



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15 ANDREW P. GORDON  
16 UNITED STATES DISTRICT JUDGE  
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